MD YUSOFF AHMAD A

v.

SITI HAJAR SARKAWI & ANOR

COURT OF APPEAL, PUTRAJAYA B
SYED AHMAD HELMY JCA
BALIA YUSOF WAHI JCA
MAH WENG KWAI J
[CIVIL APPEAL NO: W-02-773-2011]
6 JUNE 2012 C

COMPANY LAW: *Meetings - Extraordinary general meeting - Reinstatement and appointment of directors - Venue of meeting - Whether must be held at registered address of company - Whether change of venue invalidated EGM - Whether non-compliance of s. 145A of Companies Act 1965 constituted procedural irregularity* D

COMPANY LAW: *Shares - Transfer of shares - Validity of transfer - Whether share transfer form properly registered - Whether consideration certain - Whether there was breach of s. 24 of Contracts Act 1950* E

Karisma Selatan Engineering (M) Sdn Bhd ('the company') obtained a contract from the Government of Malaysia to manage the National Service Training Centre at Kem Kuala Pilah ('the camp'), Negeri Sembilan. As at 24 May 2004, the founding directors of the company which comprised the appellant and the first respondent respectively, held 51% and 49% of the shares of the company. The appellant and the first respondent then transferred part of their shares to the second respondent and the three of them held equal number of shares in the company. The appellant, who managed the company affairs, was unhappy with the transfer of shares and proceeded to remove the first respondent as a director of the company through a circular resolution. The existence of the resolutions and the removal of the first respondent were only discovered by the respondents after a search at Suruhanjaya Syarikat Malaysia was made. On 12 April 2006, the respondents requisitioned for an Extraordinary General Meeting ('EGM') to be held in order to, *inter alia*, reinstate the first respondent and to appoint the second respondent as director of the company. The EGM was held in Shah Alam and not in Malacca where the registered address of the company was. The appellant refused to attend the meeting and the first and second respondents were reinstated and appointed as directors of the F G H I

company, respectively. Be that as it may, the appellant subsequently applied for a declaratory relief relating to his shareholding in the company and to invalidate the EGM on the ground that it was not held in Malacca. The respondents counter-claimed for declaratory relief that the appellant, the first and second respondents each held 1/3 share in the shareholding of the company and that the EGM was valid. In the High Court, the respondents' counterclaim was allowed. In the present appeal, the appellant raised two grounds of appeal, namely: (i) the EGM was invalid by virtue of s. 145A of the Companies Act 1965 due to the change of venue; and (ii) the transfer of shares to the second respondent was invalid.

Held (dismissing appeal with costs)
Per Mah Weng Kwai J delivering the judgment of the court:

(1) The learned judge did not err in law in holding that the EGM convened in Shah Alam was valid notwithstanding that he did not deal with s. 145A of the Act in his judgment. The holding of the meeting managed to fulfill the object of the amendment of s. 145A of the Act which was to ensure that the meeting would not be held outside of the Federation so that members would not find it difficult to attend the meeting thereby protecting their interests. There was no evidence to show that any undue hardship was caused to the appellant by a change of the venue. The appellant did not attend the EGM not because it was held in Shah Alam but because he chose not to. In addition, the objection to the change of venue was not specifically pleaded by the appellant. Therefore, the appellant could not now be heard to complain about the non-compliance of s. 145A (pre amendment) of the Act. The alleged non-compliance of s. 145A, in any case, was a procedural irregularity curable under s. 355 of the Act and accordingly the EGM can be validated if it did not cause any injustice to the appellant. The appellant failed to prove that he suffered substantial injustice from the 'procedural irregularity'. (para 20)

(2) The appellant's Share Transfer Form ('STF') dated 23 October 2004, evincing the appellant's intention to transfer part of his shares to the second respondent was valid. The appellant did sign the STF in favour of the second respondent and his testimony that he could not remember whether he had signed the STF was baseless. The annual return of the company as at 24 November 2005 showed that the appellant,

the first and second respondents each held 166,666 shares in the company. By the time the EGM was held on 24 May 2006, the respondents were the lawful owners of their respective shares. Although the share certificates had not been issued by 24 May 2006, this did not invalidate the STFs of 23 October 2004. Further, the record of the Registrar of Companies as at 24 March 2006 showed that the appellant and the respondents were 1/3 owners of the shares of the company. (para 21)

Bahasa Malaysia *Translation Of Headnotes*

Karisma Selatan Engineering (M) Sdn Bhd ('syarikat') memperoleh kontrak daripada Kerajaan Malaysia untuk menguruskan Pusat Latihan Khidmat Negara (PLKN) di Kem Kuala Pilah ('kem'), Negeri Sembilan. Setakat 24 Mei 2004, pengarah asas syarikat yang terdiri daripada perayu dan responden pertama, masing-masing memegang 51% dan 49% saham syarikat. Perayu dan responden pertama kemudian memindahkan sebahagian daripada saham mereka kepada responden kedua dan ketiga-tiga mereka memegang jumlah saham yang sama dalam syarikat tersebut. Perayu, yang menguruskan hal ehwal syarikat, tidak berpuas hati dengan pemindahan saham tersebut dan seterusnya menyingkirkan responden pertama sebagai pengarah syarikat melalui resolusi pekeliling. Kewujudan resolusi dan penyingkiran responden pertama hanya diketahui oleh responden-responden selepas suatu carian di Suruhanjaya Syarikat Malaysia. Pada 12 April 2006, responden meminta untuk mengadakan Mesyuarat Agung Luarbiasa ('MAL') dalam usaha untuk, antara lain, mengembalikan responden pertama dan untuk melantik responden kedua sebagai pengarah syarikat. MAL tersebut diadakan di Shah Alam dan bukan di Melaka iaitu alamat berdaftar syarikat. Perayu enggan hadir ke mesyuarat tersebut dan responden pertama dan kedua masing-masing dikembalikan semula dan dilantik sebagai pengarah syarikat. Walau bagaimanapun perayu kemudian telah memohon suatu deklarasi relif bagi pegangan saham dalam syarikat dan untuk membatalkan MAL atas alasan bahawa ia tidak diadakan di Melaka. Responden menuntut balas untuk relif deklarasi bahawa perayu, responden pertama dan kedua masing-masing memegang 1/3 saham dalam syarikat tersebut dan bahawa MAL adalah sah. Di Mahkamah Tinggi, tuntutan balas responden dibenarkan. Dalam rayuan ini, perayu membangkitkan dua alasan rayuan, iaitu: (i) MAL adalah tidak sah menurut s. 145A Akta Syarikat 1965 disebabkan perubahan tempat; dan (ii) pemindahan saham-saham kepada responden kedua adalah tidak sah.

Diputuskan (menolak rayuan dengan kos)
Oleh Mah Weng Kwai H menyampaikan penghakiman mahkamah:

(1) Hakim tidak khilaf dalam undang-undang apabila memutuskan bahawa MAL tersebut yang diadakan di Shah Alam adalah sah walaupun beliau tidak menangani s. 145A Akta dalam penghakimannya. Keputusan mesyuarat berjaya memenuhi objek pindaan s. 145A Akta untuk memastikan bahawa mesyuarat tidak diadakan di luar Persekutuan supaya ahli tidak akan menghadapi kesukaran untuk menghadiri mesyuarat dengan itu melindungi kepentingan mereka. Tiada bukti menunjukkan bahawa terdapat apa-apa kesusahan kepada perayu oleh perubahan tempat. Perayu tidak menghadiri MAL bukan kerana ia telah diadakan di Shah Alam tetapi kerana dia memilih untuk tidak menghadirinya. Di samping itu, bantahan kepada perubahan tempat tidak diplidkan secara khusus oleh perayu. Oleh itu, perayu kini tidak boleh didengar mengenai aduannya tentang ketidakpatuhan s. 145A (sebelum pindaan) Akta. Dakwaan ketidakpatuhan s. 145A walaubagaimanapun adalah suatu ketidakteraturan yang boleh dibetulkan di bawah s. 355 Akta dan sewajarnya MAL boleh disahkan jika ia tidak mengakibatkan sebarang ketidakadilan kepada perayu. Perayu gagal untuk membuktikan bahawa dia mengalami ketidakadilan substansial atas 'ketidakteraturan prosedur'.

(2) Borang Pemindahan Saham perayu ('BPS') bertarikh 23 Oktober 2004 yang membuktikan niat perayu untuk memindahkan sebahagian sahamnya kepada responden kedua, adalah sah. Perayu telah menandatangani BPS memihak kepada responden kedua dan keterangan bahawa dia tidak ingat sama ada telah menandatangani BPS adalah tidak berasas. Tiada pelanggaran s. 24 Akta Kontrak 1950 oleh responden kedua. Penyata tahunan syarikat pada 24 November 2005 menunjukkan bahawa perayu, responden pertama dan kedua masing-masing memegang 166,666 saham-saham dalam syarikat. Pada masa MAL diadakan pada 24 Mei 2006, responden-responden merupakan pemilik sah saham masing-masing. Walaupun sijil saham tidak dikeluarkan pada 24 Mei 2006, ini tidak membatalkan BPS bertarikh 23 Oktober 2004. Selanjutnya rekod Pendaftar Syarikat pada 24 Mac 2006 menunjukkan bahawa perayu dan responden-responden adalah 1/3 pemilik saham syarikat.

Case(s) referred to:
Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Case [1995] 3 CLJ 639 CA ***(refd)***
State of Haryana v. Raghubir Dayal [1995] SCC (1) 133 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 103, 104, 106, 145A, 355
Contracts Act 1950, s. 24

Other source(s) referred to:
NS Bindra, *Interpretation of Statutes,* 8th edn, pp 1029-1030

For the appellant - Mohd Iqbal Zainal Abidin; M/s Megat Iqbal & Co
For the respondents - Karen Cheah; M/s Fatima Tan & Cheah

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D3-22-921-2006]

Reported by Najib Tamby

JUDGMENT

Mah Weng Kwai J:

Brief Facts

[1] On 1 September 2004 Karisma Selatan Engineering (M) Sdn Bhd (the company) obtained a contract from the Government of Malaysia to manage the National Service Training Center at Kem Kuala Pilah (the camp) in Negeri Sembilan.

[2] The appellant and the 1st respondent are the founding directors and shareholders of 254,999 (51%) and 244,999 (49%) shares respectively in the company as at 24 May 2004. The share capital was increased from 100,000 shares to 500,000 shares at an Extraordinary General Meeting of the company (EGM) held on 2 July 2004.

[3] The company has been operating the camp since 2004 but no dividends or benefits have been declared or given to the respondents.

[4] The company and the camp were in the control and possession of the appellant at the time of the trial.

[5] The Government of Malaysia paid the company on an average, a sum of about RM500,000 for running the camp per session. Several camp sessions were held in a year. The provision

of food and accommodation and facilities for the various activities for the trainees seldom exceeded RM150,000 per camp session and the company made reasonable profits.

[6] The appellant and the 1st respondent agreed to transfer part of their shareholding to the 2nd respondent so that all three of them would hold an equal number of shares in the company as the 2nd respondent was instrumental in securing the licence for the camp for the company. The Share Transfer Form (STF) for this purpose was signed by the appellant and the 1st respondent on 23 October 2004 in the presence of the then company secretary. The appellant agreed to transfer 88,332 shares of RM1 each and the 1st respondent likewise agreed to transfer 78,334 shares in the company to the 2nd respondent. The STFs were stamped on 5 November 2004.

[7] However, the appellant who was effectively managing the affairs of the company, was not happy after the transfer of his shares to the 2nd respondent and adopted an antagonistic position towards the respondents.

[8] From February 2006, the appellant in his efforts to wrest control of the company, caused the then company secretary to effect numerous changes in the Board of Directors and in the affairs of the company. The main changes were *inter alia*:

(i) certified a circular resolution accepting the resignation of the 1st respondent as a director, when the 1st respondent had no intention of resigning;

(ii) altered the signatories of the company's bank account with Affin Bank and appointed himself as the sole signatory of the account;

(iii) appointed one Sabri bin Ahmad as a director to replace the 1st respondent; and

(iv) replaced the company secretary.

[9] The appellant was able to pass the circular resolutions pursuant to Articles 5 and 90 of the Articles of Association of the company as the 1st respondent had been wrongfully removed as a director of the company.

[10] The respondents only discovered the existence of the resolutions and the removal of the 1st respondent as a director of the company after a search was made on the company with

Suruhanjaya Syarikat Malaysia on the complaint by the 2nd respondent over the delay in the issuance of the share certificate to her.

[11] As at 24 November 2005, the appellant, the 1st and 2nd respondents each held 166,666 shares in the company as can be seen in the Form of Annual Return of a company having a share capital.

[12] On 12 April 2006 the respondents being members holding not less than one tenth of the paid up capital, requisitioned for an EGM to be held for the purpose of *inter alia*, removing the appellant as a director, to reinstate the 1st respondent as a director and to appoint the 2nd respondent as a director of the company. On 16 May 2006, the respondents gave notice to the company and the company secretary that the EGM would be held at Hotel Concorde, Shah Alam on 24 May 2006.

[13] The appellant did not attend the EGM and resolutions tabled at the EGM were passed without opposition.

[14] Following the resolutions passed at the EGM to reinstate the 1st respondent as a director and to appoint the 2nd respondent as a director of the company, the appellant filed a suit seeking declaratory relief relating to his shareholding in the company and to invalidate the EGM on the ground that it was not held in the State of Malacca.

[15] The respondents filed their counterclaim also seeking declaratory relief that the appellant, the 1st and 2nd respondents each held 1/3 of the shareholding of the company and that the EGM was validly held.

[16] The appellant withdrew his claim against the respondents a day before the trial. The respondents proceeded to trial on their counterclaim and called seven witnesses. The appellant elected not to give evidence himself nor to call any witnesses in defence to the counterclaim. The learned High Court Judge after a full trial of the counterclaim allowed the respondents' claim on 18 February 2011.

[17] Being dissatisfied with the decision of the High Court judge, the appellant appealed to the Court of Appeal.

A **Grounds Of Appeal**

[18] Essentially, the appellant had two grounds of appeal namely:

(i) that the EGM was invalid as it was held in Shah Alam, Selangor and not in Malacca where the registered address of the company was, in contravention of s. 145A of the Companies Act 1965 (CA); and

(ii) that the transfer of the shares to the 2nd respondent was not valid as the STF was not properly registered and that the consideration was doubtful.

Decision Of The Court

[19] Upon reading the record of appeal and the written submissions and upon hearing the oral submissions of counsel, the court dismissed the appeal with costs.

Grounds Of Decision

[20] *First Issue: Whether the EGM was invalid*

(i) Counsel for the appellant submitted that the learned judge failed to consider the effect of s. 145A of the CA as at 24 May 2006, in coming to his decision.

(ii) Section 145A reads:

> Place of meetings
>
> Where any meeting (including an adjourned meeting) is required to be held under this Division, it shall be held in the State where its registered office is situated.

The section was however amended on 15 August 2007 *vide* the Companies (Amendment) Act 2007.

Section 145A now reads:

> Venue and technology for company meetings
>
> A Company shall hold all meetings of its members within Malaysia and may hold a meeting of its members within Malaysia at more than one venue using any technology that allows all members a reasonable opportunity to participate.

(iii) Counsel submitted that as the meeting of members (and not a meeting of the Board of Directors) was held prior to the amendment of s. 145A, it was mandatory that the meeting be held in Malacca, being the State where the registered office of the company was located and that a meeting held in Shah Alam, Selangor would render the EGM invalid.

(iv) Section 145A of the CA prior to its amendment on 15 August 2007 was inserted *vide* Companies (Amendment) Act 1966 (Act A21) which came into force on 28 March 1969. Clause 16 of the Explanatory Note to the Companies (Amendment) Bill 1969 explained that "the object of the amendment was to compel companies to hold meetings in the State where its registered office is situated and not outside of the Federation thereby protecting the interests of members of the company resident in Malaysia".

(v) The court is of the view that the holding of the EGM in Shah Alam did not invalidate the meeting. The holding of the meeting in Shah Alam instead of in Malacca managed to fulfill the object of the amendment which was to ensure that the meeting would not be held outside of the Federation so that members would not find it difficult to attend the meeting thereby protecting their interests.

(vi) There was no evidence to show that any undue hardship was caused to the appellant by a change of the venue. It would appear that the appellant did not attend the EGM not because it was held in Shah Alam which is after all only a two hour drive from Malacca, but that he chose not to. It will also be noted that the appellant had engaged his solicitors who are from Petaling Jaya to act for him in this appeal.

(vii) In the appellant's statement of claim which was withdrawn a day before the trial, no issue was made of the purported contravention of s. 145A CA. What was disputed by the appellant was only with regard to the notice of the EGM. As the objection to the change of venue was not specifically pleaded by the appellant, the appellant cannot now be heard to complain about the non-compliance of s. 145A (pre amendment), which appears to be an afterthought for purposes of the appeal.

(viii) The court is of the view that given the explanation in cl. 16 of the Explanatory Note to the Companies (Amendment) Bill 1969, the word "shall" in s. 145A is to be read as being directory in nature and not mandatory.

Ordinarily the use of the word 'shall' implies a mandatory obligation but that is not an absolute rule in all cases. In NS Bindra's, *Interpretation of Statutes* (8th edn) at pp. 1029/1030 it is stated as follows:

> The word 'shall' in its ordinary signification is mandatory though there may be considerations which influence the court in holding that the intention of the Legislature was to give discretion. But this word is not necessarily mandatory, nor always mandatory. Whether the matter is mandatory or directory only depends upon the real intention of the Legislature which is ascertained by carefully attending to the whole scope of the statute to be construed.
>
> The use of the word 'shall' would not by itself make a provision of the Act mandatory. It is to be construed with reference to the context in which it is used. Similarly, mere use of the word 'shall' or the absence of it, does not decide the question whether a provision is directory or mandatory.
>
> When a statute uses the word 'shall' *prima facie*, it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature, the court may consider, *inter alia*, the nature and the design of the statute, and the consequences which would follow from construing it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provision, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow there from, and, above all, whether the object of the legislation will be defeated or furthered.

In the case of *State of Haryana v. Raghubir Dayal* [1995] SCC (1) 133, the Supreme Court of India had occasion to observe as follows:

> The word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, or consequences to flow from such construction would not so demand. Normally, the word 'shall' *prima facie* ought to be

considered mandatory but it is the function of the court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word 'shall' therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be ascribed to the word, 'shall, as mandatory or as directory, accordingly.

(ix) In any event the alleged non-compliance of s. 145A is a procedural irregularity which has not caused any injustice to the appellant. This irregularity or defect can be cured by s. 355 CA and accordingly the EGM can be validated in the circumstances. The appellant bears the burden of proving that he has suffered substantial injustice from the "procedural irregularity" but has failed to do so. (See *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Case* [1995] 3 CLJ 639).

(x) The learned judge did not err in law when he held that the EGM convened in Shah Alam was valid notwithstanding that the learned judge did not deal with s. 145A in his judgment.

[21] *Second Issue: Whether the share transfer of 23 October 2004 was valid*

(i) The appellant contended that the transfer of part of his shares to the 2nd respondent was invalid as the purported transfer was in breach of the procedural requirements under ss. 103, 104 and 106 of the CA, that the STF (Form 32A) was not certified by the company and that the transfer was not registered prior to the respondents' counterclaim.

(ii) Further, the appellant contended that the consideration for the transfer was in breach of s. 24 of the Contracts Act 1950 in that the consideration was not paid in cash although it was stated to be so on the STF.

(iii) The court is of the view that the appellant's STF dated 23 October 2004 is valid, evincing the appellant's intention to transfer part of his shares to the 2nd respondent, on the following grounds:

(a) to begin with, the procedural defects in the STF complained of by the appellant were not even stated in his Memorandum of Appeal as a ground of appeal and hence catching the respondents by surprise;

(b) the learned judge found as of fact that the appellant did sign the STF in favour of the 2nd respondent. The learned judge rejected the appellant's testimony that he could not remember whether he had signed the STF;

(c) the evidence of the company secretary (DW4), an independent witness, confirmed that the STF was signed by the appellant in his presence at his office in Graha Maju, Malacca on 23 October 2004 and that the stamp duty payable on the STF was in fact paid by the appellant himself;

(d) insofar as the consideration for the transfer of shares was concerned, the appellant based his challenge on the contravention of s. 24 of the Contracts Act 1950 whereas in his submissions counsel for the appellant confined his challenge to procedural irregularities;

(e) the consideration for the transfer of part of the appellant's shares to the 2nd respondent was that the 2nd respondent would help secure the contract from the Government of Malaysia for the company to run the National Service Training Camp. The 2nd respondent had performed her obligation and there was a valid contract concluded with the appellant and the 1st respondent. No doubt the 2nd respondent did not pay any money to the appellant for her portion of the shares but it will be noted that the consideration sum stated on the STF was RM88,332 which coincided with the number of shares (at the par value of RM1 each) that the appellant had previously agreed to transfer to the 2nd respondent. The consideration stated although not paid in Ringgit to the appellant was meant to represent the value of the 2nd respondent's efforts (in so far as the appellant was personally concerned) in securing the contract from the Government of Malaysia for the company. In the circumstances, the court is of the view that there was no breach of the provisions of s. 24 of the Contracts Act by the 2nd respondent;

(f) the appellant failed to discharge his burden to prove that the signature was not his;

(g) the Annual Return of the company as at 24 November 2005 showed that the appellant, the 1st and 2nd respondents were each holding 166,666 shares in the

company and as such by the time the EGM was held on 24 May 2006 the respondents were regarded as the lawful owners of their respective shares;

(h) although the share certificates had not been issued by 24 May 2006, this did not invalidate the STFs of 23 October 2004; and

(i) the record of the Registrar of Companies as at 24 March 2006 showed that the appellant and the respondents are 1/3 owners of the shares of the company. (See Rekod Rayuan Jld 6 p. 692).

Conclusion

[22] The court is of the view that the learned judge did not err in law or in fact in granting the declaratory orders sought by the respondents, notwithstanding that no company resolution was passed for the transfer of the shares by the appellant to the 2nd respondent and that there was no issuance of share certificate at the material time.

[23] The court was fully satisfied that the appellant had signed the STF voluntarily evincing his intention to transfer the shares to the 2nd respondent.

[24] In the result the appeal was dismissed with costs of RM20,000.